No. 73-737

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH ESPOSITO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
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Washington, D.C. 20530.

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Petitioner contends that electronic recordings, which he now claims were largely unintelligible, should not have been admitted at trial, and that transcripts of the recordings should not have been given to the jurors.

1. After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of possession and sale of counterfeit United States currency, in violation of 18

U.S.C. 472 and 473. He was sentenced to imprisonment for three years. The court of appeals affirmed on September 7, 1973 (Pet. App. 34-38).

In early March 1972, Cardonick, a probationer for a state offense who was also a paid informant for the government, was asked by petitioner, an old acquaintance who had become his probation officer, whether he was interested in purchasing counterfeit currency. Petitioner stated that he had access to such currency, which could be purchased for ten percent of its face value. Cardonick reported this conversation to Secret Service Agent McDonnell, who instructed him to accept the offer. Cardonick consented to the use of electronic devices for the monitoring of his conversations with petitioner (Tr. 111-119, 58-59).[1] On the morning of March 9, Cardonick, equipped with such a device, met petitioner and agreed to buy $25,000 in counterfeit currency (Tr. 127-129).

On March 13, Cardonick, accompanied by agent Chacos, met petitioner at the corner of Broad and Snyder in Philadelphia (Tr. 131-138). When petitioner saw Chacos with Cardonick, he told Cardonick to go to another location, where the transfer took place. Cardonick returned to Chacos with the $25,000 in counterfeit currency (Tr. 131-147). The movements of Cardonick and petitioner were observed

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[1] "Tr." refers to the trial transcript, which we are lodging with the Court.

by other agents (Tr. 256-261, 262-265, 266-271, 300-309).[2]

Approximately 35 conversations between petitioner and Cardonick were recorded between March 9 and March 23, 1972 (Tr. 49, 100). Some of these were monitored by devices placed on Cardonick's person, others by devices placed in his automobile and on telephones used by him, all with his consent (Tr. 27-28, 48-50). At times, conversations were inaudible to the officers and could not be recorded (Tr. 22-26). The recordings that were made were later transferred to a master tape and introduced in evidence (Tr. 29, 38, 42-45, 50-55, 94-95, 100).

Petitioner's contention that the recordings were "utterly inaudible" (Pet. 22) is unsupported by the record. Petitioner's sole objections at the pre-trial conference were that the tape contained prejudicial matter relating to illegalities in the sale of cigarettes and that taped conversations occurring after the alleged transfer of counterfeit money on March 13 were irrelevant (Tr. 2-10). Although petitioner now contends that the trial court should have compared the tape and the transcript before trial, no such request was made at that time. Indeed, no claim was made that the tape was unintelligible or that the transcript thereof was inaccurate.

On the morning of the second day of trial, the court announced that it had read the transcript of

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[2] No arrest was made at the time, to protect the investigation concerning the source of the counterfeit currency (Tr. 87-88).

the tape and had found nothing which should be excluded except the references to cigarettes (Tr. 100-101). The court then stated that copies of the transcript might be supplied to the jury in order to avoid confusion as to who the speakers were (Tr. 102-103).[3] Petitioner objected that it was "perfectly clear from listening to the tape that the people identify themselves" (Tr. 105). When the court disagreed with this observation, counsel responded (Tr. 106):

> This is for the jury to consider. If the jury can't understand who the parties are or what is being said, we can stop the tape and make the identities known.
>
> * * * *
>
> I think Your Honor can only rule upon this by listening to the tapes and hearing for yourself whether or not you feel the jury would not be able to know what is going on, who is talking or whether or not the tapes are intelligible.

The court overruled petitioner's objection because it believed that the use of the transcript would aid in identifying the speakers. The court stated, however, that it would instruct the jury, as counsel requested, that the transcript was "simply the interpretation of the recording by Mr. McDonnell who has testified that he prepared the transcript and if their hearing of the tape differs in any fashion from what the transcript says, it is their hearing that determines what the conversation was on the tape" (Tr. 108). That instruction was given both at the time

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[3] The transcripts were not available to the jury during their deliberations.

the transcript was given to the jury (Tr. 124-125) and again in the charge (Tr. 517).

When the master tape combining all the various recordings was introduced in evidence during the testimony of Cardonick, the only objection made was that there had been an insufficient showing of consent to the recording (Tr. 122). Thereafter, as the testimony of Cardonick unfolded, various portions of the tape were played while the jury followed corresponding portions of the transcript. Cardonick testified that the transcript accurately reflected the various conversations (Tr. 123-125, 134-135, 136, 141, 151, 154-155, 156-157, 159-161). During cross-examination of Cardonick, the defense played portions of the tape concerning eight other conversations (Tr. 228-234). Transcripts to identify the participants in those conversations were not furnished, leading one juror to object to their absence, to which petitioner's counsel responded: "Perhaps they should have a transcript of that." The court said that would be up to counsel, whereupon counsel read from the transcript (Tr. 234-239).

2. Petitioner asserts, without citation to the record, that "[i]n every case, the incriminating tapes played for the jury were utterly inaudible" (Pet. 21-22). This claim is based upon a "Reporter's Note" contained on a loose sheet in volume I of the trial transcript,[4] and an interpretation placed upon the juror's

[4] The reporter's note states:

> The portions of the record relating to the playing of the recorded conversations have not been transcribed

complaint, *supra*, during cross-examination of government witness Cardonick.[5] No objection was made at trial that the transcript prepared by Agent McDonnell was inaccurate or that the recording was so inaudible that it furnished no basis for the transcript. Pursuant to Rule 16, Fed. R. Crim. P., the tapes were furnished to defense counsel for a sufficient time prior to trial to permit transcription, so that he could at trial have pointed to any instance in which Agent McDonnell's transcription was inaccurate. Petitioner did not do so then, when the tapes were available for comparison. He should not be permitted to do so now.

Nor is there basis for the assertion, again without citation to the record, that "[p]re-trial objection to the accuracy of the transcript was not permitted" (Pet. 22). Indeed, even at trial when defense counsel suggested the court should listen to the tape, there was no suggestion that this was appropriate because the transcript might be inaccurate; the contention was instead that the judge could then conclude that the tapes were so clear that no transcript was necessary (Tr. 106).

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because the Reporter was unable to make an intelligible transcript of the same.

The fact that the Reporter did not attempt to transcribe a word for word record from a single hearing of the tape does not, of course, indicate that it was so inaudible as to be unintelligible.

[5] The juror's complaint seems to have been directed to the difficulty in identifying the speakers without an accompanying transcript. Counsel then acknowledged that the transcript would be helpful and read several pages therefrom, without indicating any reservations about its accuracy.

In view of the lack of objection below to any portion of the transcript as inaccurate or to the tape itself as unintelligible, and the court's careful instructions both at the time the transcript was admitted and in its charge, there was no abuse of the trial court's discretion. The tape was properly received in evidence, and the transcript thereof was properly allowed to be used as an aid in listening to it. See *Fountain* v. *United States*, 384 F.2d 624, 631-632 (C.A. 5), certiorari denied *sub nom. Marshall* v. *United States*, 390 U.S. 1005; *United States* v. *Carson*, 464 F.2d 424, 436-437 (C.A. 2); *United States* v. *Hall*, 342 F.2d 849, 852-853 (C.A. 4); *United States* v. *Weiser*, 428 F.2d 932, 937 (C.A. 2), certiorari denied, 402 U.S. 949.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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[6] Even if the tape was not entirely clear, the use of the transcript was appropriate to avoid the necessity of playing the tape several times to assure that it was properly understood. See *United States* v. *Lawson*, 347 F. Supp. 144, 148 (E.D. Pa.). Even where approximately half of a taped conversation was found to be inaudible, a transcript of the audible portions was held to have been properly admitted. *Addison* v. *United States*, 317 F.2d 808, 815 (C.A. 5), certiorari denied, 376 U.S. 905.

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